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Supreme Court, U.S.
FILED
OCT 14 2003
OFFICE OF THE CLERK

No. 03-227

IN THE

Supreme Court of the United States

USHA VAKHARIA, M.D.,

Petitioner,

v.

LITTLE COMPANY OF MARY HOSPITAL & HEALTH CARE CENTERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the Court of Appeals err by holding that the District Court did not abuse its discretion by striking Petitioner's response to a motion for summary judgment due to Petitioner's repeated refusal to comply with Local Rule 56.1 and the District Court's prior orders?

II. Did the Court of Appeals err by holding that the District Court properly granted summary judgment on the remaining record after the District Court struck Petitioner's response for repeated failure to comply with both the District Court's prior orders and Local Rule 56.1?

III. Is there a conflict among the Court of Appeals concerning the Questions Presented?

CORPORATE DISCLOSURE STATEMENT

Respondent Little Company of Mary Hospital & Health Care Centers furnishes the following information in compliance with Supreme Court Rule 29.6:

(1) Little Company of Mary is a Section 501(c)(3) corporation. Its sole corporate member is The American Province of the Sisters of Little Company of Mary.

(2) There is no parent and no publicly held company owns 10% or more of the corporation's stock.

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The Respondents, Little Company of Mary Hospital and Health Care Centers, *et al.*, (collectively, the "Hospital") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's unpublished order in this case.

STATEMENT OF THE CASE

The Petition for Certiorari comes before this Court in the final stage of Petitioner Usha Vakharia, M.D.'s nine-year legal odyssey, a journey marked by myriad false starts, wrong turns, and refusals to obey the rules of the road. Despite Dr. Vakharia's reference to *Conley v. Gibson*, 355 U.S. 41 (1957), however, her cause was rejected by both courts below not for "one misstep," 355 U.S. at 48, but rather for an entire marathon of errors.

This case arises out of Respondent Little Company of Mary Hospital and Health Care Centers' relationship with Petitioner Usha Vakharia, M.D. When Dr. Vakharia refused to join an exclusive provider group in the Hospital's Department of Anesthesiology (the "Department"), the Hospital terminated her access to its patients and facilities. Dr. Vakharia subsequently sued the Hospital for race-, gender-, and ethnicity-based employment discrimination, antitrust violations, and breach of contract, among other claims. Having lost before both the District Court and the Court of Appeals, Dr. Vakharia filed her Petition for Writ of Certiorari with this Court.

A. Background Facts.

The Hospital is a not-for-profit general acute care facility affiliated with the Catholic Church. Located in the Chicago suburb of Evergreen Park, Illinois, the Hospital has served patients of all races, colors, nationalities, and economic means for decades. During Dr. Vakharia's tenure with the Department, a majority of the anesthesiologists were foreign-born and held degrees from medical schools located outside the United States. (Def. 56.1 ¶ 29.)[1]

1. Approval of Dr. Vakharia's Application for Medical Privileges.

Dr. Vakharia's association with the Hospital began on February 20, 1992, when she submitted a preliminary application for medical privileges and asked to be assigned work in the Department on an "as-needed" basis. Dr. Vakharia sought privileges at the Hospital because her previous workplace, Swedish Covenant Hospital ("Swedish Covenant") summarily suspended her privileges on July 31, 1989, after an audit conducted by an independent association of anesthesiologists found serious deficiencies in Dr. Vakharia's quality of care. *See also Vakharia v. Swedish Covenant Hospital*, 987 F. Supp. 633 (N.D. Ill. 1997), *aff'd*, 190 F.3d 799 (7th Cir. 1999), *cert. denied,* 530 U.S. 1204 (2000). Dr. David Roth, a Defendant below and Respondent here, was the Chairperson of the Department at the time Dr. Vakharia submitted her application. Dr. Roth was aware

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1. Respondents use "Def. 56.1" to refer to Defendants' Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment, filed with the District Court below at R. 234. The exhibits attached thereto are referred to as "Def. Ex."

of Dr. Vakharia's status as an Asian Indian, and nevertheless immediately approved Dr. Vakharia's preliminary application. The Hospital granted Dr. Vakharia interim privileges on March 9, 1992, and Dr. Vakharia began working on an as-needed basis shortly thereafter. (Def. 56.1 ¶¶ 30–34.)

A few weeks later, on March 26, 1992, the Hospital gave Dr. Vakharia an application for medical staff privileges. Dr. Vakharia failed to return the application until August 1, 1992, and the materials she submitted did not include required medical references. Meanwhile, Dr. Vakharia impeded the Hospital's ability to verify her employment history by initiating litigation against Swedish Covenant for its release of similar information to another area hospital where Dr. Vakharia had applied for privileges. With critical information unverified, the Hospital was not able to send Dr. Vakharia's application for medical privileges to the Department for its consideration and approval. In the meantime, Dr. Vakharia continued to work on an as-needed basis as she had requested. (Def. 56.1 ¶¶ 35, 37–41.)

Dr. Vakharia did not submit a complete application until January 1993. By that time, Dr. Padma Rao, a female Asian Indian, was the Department Chairperson. In the same month that Dr. Vakharia completed her application, the medical staff office forwarded it to the Department. On March 8, 1993, the Department first considered Dr. Vakharia's application, and on April 8, 1993, the Department approved it. The Department then forwarded Dr. Vakharia's application to the Hospital's Credentials Committee, which approved it on June 21, 1993, and sent it to the Hospital's Executive Committee. On June 24, 1993, the Executive Committee approved Dr. Vakharia's application for anesthesiology privileges, and the Hospital Board approved full medical

privileges for Dr. Vakharia on July 6, 1993. (Def. 56.1 ¶¶ 42–44.) As with all doctors employed by the Hospital, the grant of such privileges did not affect Dr. Vakharia's work schedule; rather, she continued to work on an as-needed basis pursuant to her initial request. (Def. 56.1 ¶¶ 15–15, 25.)

2. Selection of Evergreen as Exclusive Anesthesia Group Practice.

Like many hospitals, the Hospital eventually decided to hire an exclusive service provider group to administer and staff the Department of Anesthesiology. Following a lengthy selection process, the Hospital selected Dr. Wilfred K. Boarden, an African-American, as Department Chair and group president for the purposes of organizing such an exclusive group practice. Dr. Boarden, however, declined the offer. The Hospital then turned to Drs. Roth and Chidambaram Srinivasan, a male Asian Indian, to organize and implement the exclusive provider group. Drs. Roth and Srinivasan formed Evergreen Anesthesia & Pain Management Services, S.C., ("Evergreen") which in turn entered into an exclusive contract to provide anesthesia services for the Hospital. (Def. 56.1 ¶¶ 50–51.)

The exclusive contract, like similar contracts in other Hospital Departments, allowed only those anesthesiologists employed by Evergreen to provide services to the Hospital's patients. Evergreen staffed itself by offering employment to all those anesthesiologists with privileges at the Hospital on the same schedule as they previously worked, including Dr. Vakharia. Rather than accept Evergreen's offer, Dr. Vakharia declined the contract. (Def. 56.1 ¶ 51.) As a

result, and pursuant to the terms of the exclusive contract, the Hospital denied Dr. Vakharia access to the Hospital's anesthesia equipment and operating suites. (Def. 56.1 ¶ 52.)

3. Dr. Vakharia's Invocation of Administrative Remedies.

Dr. Vakharia sought an administrative hearing under the Hospital's bylaws to challenge the determination that she could no longer work in the Department. During the hearing, Dr. Vakharia failed to identify any provision of the Hospital's bylaws that the Hospital breached by entering into the Evergreen agreement or by subsequently barring Dr. Vakharia from the Hospital after she refused to join Evergreen. (Def. Ex. 4 at 213–218, 221, 225–226, 240–42, 244.)

Following the hearing, the committee of the Hospital's Board of Trustees made certain findings of fact, including, among others, that Dr. Vakharia was offered a contract to join Evergreen, that she did not accept the offer, and that she made no counterproposal to join Evergreen under different terms. Furthermore, the committee found that Dr. Vakharia had presented no evidence of any discrimination on the part of the Hospital or Evergreen. The Hospital's Board of Directors adopted the factual findings and unanimously resolved to terminate Dr. Vakharia's access to the Hospitals' facilities. (Def. Ex. 7.)

B. The Proceedings Below.

Dr. Vakharia embarked on this legal journey on September 13, 1994, by filing a 178-paragraph complaint in the United States District Court for the Northern District of Illinois, naming an estimated 500 defendants, including the

entire medical staff of the Hospital. (R. 1.)[2] Her complaint attempted to allege discrimination in violation of 42 U.S.C. § 1981 (2003), antitrust conspiracy in violation of the Sherman Act, breach of the medical staff by-laws, and violations of 42 U.S.C. §§ 1985 and 1986 (2003). Dr. Vakharia's apparent thesis was that she was a victim of improper employment discrimination based on her race, ethnicity, and gender.

1. Dr. Vakharia's Amended Complaints.

Dr. Vakharia amended her original complaint on June 1, 1995, adding claims under Title VII, 42 U.S.C. §§ 2000e to 2000e-17, and the Age Discrimination in Employment Act. (R. 101.) On March 7, 1996, the District Court granted the Hospital's motion to dismiss on all counts, ruling that the amended complaint suffered from numerous procedural defects and presented a wholesale failure to comply with Rule 8 of the Federal Rules of Civil Procedure. *See Vakharia v. Little Co. of Mary Hosp. & Health Care Ctrs.*, 917 F. Supp. 1282, 1302–03 (N.D. Ill. 1996). As part of its ruling, the District Court imposed Rule 11 sanctions against Dr. Vakharia in the amount of $14,135.40. (R. 143.)

Dr. Vakharia filed a second amended complaint, which the District Court dismissed in part on April 20, 1998.[3]

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2. Respondents cite to the Record on Appeal with the format "R. __."

3. Dr. Vakharia asserts that the Hospital's motion to strike and dismiss the second amended complaint "was denied on April 20, 1998." (Pet. at 4.) In fact, the District Court granted the Hospital's motion to dismiss Counts II, IV, and VI of the second amended (Cont'd)

(R. 187.) After almost seven years of litigation, Dr. Vakharia's allegations were whittled down to two claims: (1) Count 1, alleging an improper delay in processing Dr. Vakharia's application under 42 U.S.C. § 1981; and (2) Count III, alleging a breach of the Hospital's bylaws. On April 13, 1999, Dr. Vakharia sought leave to file a third amended complaint, which the District Court denied on the grounds of futility and delay. (R. 205.)

2. The Hospital's Motion for Summary Judgment.

The Hospital moved for summary judgment on August 15, 2001. (R. 233–34.) Vakharia failed to meet three court-imposed deadlines for responding to the Hospital's motion for summary judgment. The District Court's lenient grants of numerous opportunities for Dr. Vakharia to file her response were met with continued delays and obstruction. (R. 238–41.) Due to Dr. Vakharia's delays, the Hospital moved to bar Dr. Vakharia's response. (R. 242.)

On November 13, 2001, just days prior to oral argument on the Hospital's motion to bar Dr. Vakharia's response, Dr. Vakharia moved for leave to file a response, together with her motion for leave to file a brief in excess of fifteen pages. (R. 244.) Dr. Vakharia's proffered response ignored the District Court's prior orders, the Federal Rules of Civil Procedure, and Local General Rules for the United States District Court for the Northern District of Illinois

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(Cont'd)

complaint, granted the Hospital's motion to strike Count V, but denied the Hospital's motion to strike certain allegations of Counts I and III. (R. 187.)

("Local Rules") governing summary judgment motions. (R. 243, 278.) *See* Fed. R. Civ. P. 56; Local Rule 56.1(b).[4]

Examples of the multiple missteps in Dr. Vakharia's pleadings included arguments made without citation to evidence, citations to lengthy documents lacking any specificity, and attempts to raise arguments related to dismissed counts of the second amended complaint. (R. 278.) On November 16, 2001, the District Court heard and granted the Hospital's motion to bar and strike Vakharia's untimely and otherwise faulty response, including all supporting documents, in its entirety, and imposed $2,500 in sanctions. (R. 243.) The District Court allowed Dr. Vakharia until November 30, 2001, to file a proper response that complied with all the District Court's prior orders and conformed to the Federal and Local Rules. The District Court cautioned Dr. Vakharia that if she did not comply, the result would be a ruling on the Hospital's motion for summary judgment without the benefit of any response from Dr. Vakharia. (R. 243.)

On November 30, 2001, Dr. Vakharia filed her second response. This pleading suffered from many of the same

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4. Local Rule 56.1 provides, in part,

> [e]ach party opposing a motion filed pursuant to Fed. R. Civ. P. 56 shall serve and file — (1) any opposing affidavits and other materials referred to in Fed. R. Civ. P. 56(e); (2) a supporting memorandum of law; and (3) a concise response to the movant's statement that shall contain [ ] a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon. . .

defects as the first response. (R. 245–48.) The Hospital filed another motion to strike the second response, citing but a few examples of the many deficiencies in the second response. (R. 249.) The District Court agreed with the Hospital, describing several problems present in the second response in an attempt to provide Dr. Vakharia with guidance on how to make the second response conform. (R. 278.) On January 15, 2002, the District Court issued an order striking the second response in its entirety and granting Dr. Vakharia one last opportunity to cure the defects in her pleadings. (R. 255.)

Dr. Vakharia filed her third response on February 1, 2002. (R. 256–59.) Once again, the pleadings contained countless defects, including argument improperly addressing matters previously dismissed from the litigation and failing to provide specific citations to admissible evidence. Worse, these errors had persisted despite repeated requests and warnings by the District Court that such defects would result in the pleadings being stricken pursuant to Local Rule 56.1. Accordingly, the Hospital filed its third motion to strike Dr. Vakharia's response. (R. 262.)

Finally, on March 28, 2002, the District Court entered an order striking Dr. Vakharia's third response to the Hospital's summary judgment motion, denying Dr. Vakharia's request for leave to file yet another amended complaint, and granting the Hospital's motion for summary judgment on all counts. (R. 268.) Dr. Vakharia appealed, arguing that (1) the District Court improperly struck her response to the Hospital's summary judgment motion; (2) improperly denied her request for leave to file an amended complaint; and (3) erroneously granted summary judgment in favor of the Hospital.

3. The Court of Appeals Affirms.

On March 25, 2003, the Court of Appeals issued an unpublished order affirming the District Court's opinion. After a careful review of the record, the Court of Appeals determined that (1) the District Court did not abuse its discretion when it struck Dr. Vakharia's response to the Hospital's motion for summary judgment because Dr. Vakharia "ignored the court's admonishments and cannot now claim that the court treated her unfairly after it patiently tolerated her disregard of its orders" (Pet. at App. 5); (2) the District Court did not abuse its discretion when it denied Dr. Vakharia's request for leave to file a third amended complaint on the grounds of futility and delay (Pet. at App. 6); and (3) the District Court properly granted the Hospital's motion for summary judgment on Counts I and III because "[t]here was no evidence upon which the court could have *denied* summary judgment" (Pet. at App. 7 (emphasis added)). The Court of Appeals denied Dr. Vakharia's petition for rehearing on April 22, 2003. (Pet. at App. 22.) Dr. Vakharia's petition for a writ of certiorari followed.

REASONS FOR DENYING THE PETITION

A. This Court Should Deny the Writ on Dr. Vakharia's First, Third, and Fourth Questions Presented Because the Court of Appeals Properly Determined That the District Court Did Not Abuse Its Discretion by Striking Petitioner's Deficient Response After Three Opportunities to File a Conforming Submission and Granting Summary Judgment on the Remaining Record.

Dr. Vakharia's first, third, and fourth Questions Presented are based on the erroneous premise that the District Court granted the Hospital's motion for summary judgment because Dr. Vakharia violated Local Rule 56.1. Instead, the Court of Appeals properly understood that the District Court engaged in a two-step process: first deciding that Dr. Vakharia's repeated refusal to conform her response to its orders and to the Federal and Local Rules concerning summary judgment warranted striking her entire proposed third response; and then, based on the remaining record, determining that no genuine issue of material fact precluded the entry of summary judgment in favor of the Hospital. The Court of Appeals fully considered the issues below, and correctly affirmed the opinion of the District Court.

1. The District Court Properly Struck Dr. Vakharia's Third Response Because It Failed to Comply with the Federal Rules, Local Rules, and the District Court's Prior Orders.

The Seventh Circuit Court of Appeals has consistently upheld the discretion of a district court to demand strict compliance with local rules concerning summary judgment.

Bordelon v. Chicago Sch. Reform Bd. of Trs., 233 F.3d 524, 527 (7th Cir. 2000). Procedures for structuring the summary judgment process are vital because they "assist the court by organizing the evidence, identifying undisputed facts, and demonstrating precisely how each side propose[s] to prove a disputed fact with admissible evidence." *Id.* (quoting *Markham v. White*, 172 F.3d 486, 490 (7th Cir. 1999).) Despite Dr. Vakharia's attempts to categorize this rule as oppressive and contrary to the interests of justice (Pet. at 9–11), such rules serve to streamline the operation of the courts by exposing whether any genuine issue of material fact remains in the case.

When responses to summary judgment contain evasive answers, improper legal argument, and fail to provide specific citations to facts precluding summary judgment, a District Court is well within its discretion to strike the entire response. *Bordelon*, 233 F.3d at 527. Although her Petition suggests otherwise (Pet. at 8–11), the District Court demonstrated a great deal of leniency regarding Dr. Vakharia's repeated delays (R. 238–41) and provided Dr. Vakharia with clear instructions on how to submit an appropriate response (R. 278). Despite these multiple opportunities to submit a conforming response, Dr. Vakharia's third response was improper for a variety of reasons.

(a) Dr. Vakharia's Third Response Lacked the Requisite Specificity.

The third response's first failing was a lack of specificity. Dr. Vakharia's statement that she did provide "65 citations to specific paragraphs" (Pet. at 12) lends no support to her argument because it fails to address two fundamental issues: (1) many of the remaining factual citations were sweeping

references to piles of exhibits without any specificity or explanation of why the cited materials were relevant; and (2) many legal citations consisted solely of statements of well-settled law without providing any analysis of how the principles applied to her case.[5] Both the District Court and the Court of Appeals referenced these failings in their rulings. (Pet. at App. 5, 16–17.)

(b) Dr. Vakharia Failed to Cite Proper Evidence.

Similarly, Dr. Vakharia's complaint that the non-moving party "may lose whichever way he turns" (Pet. at 15) if a district court applies Local Rule 56.1 to require citation to proper evidence is nonsensical. First, the District Court did not strike Dr. Vakharia's entire response on the basis of a single absence of citation. Rather, as the District Court observed, Dr. Vakharia's third response was replete with inferences and opinions not substantiated by specific facts, in direct contravention of the District Court's prior orders. (R. 278; Pet. at App. 16–17.) *Compare Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 887 (7th Cir. 1998) (noting that such inferences are permissible, but only if supported by specific facts).

Second, there is no reasonable risk that a non-moving party could be confused as to what type of evidence may be

5. Similarly, Dr. Vakharia's complaint that the District Court improperly invoked Federal Rule of Civil Procedure 12(f) when striking her pleadings (Pet. at 11) fails because the District Court's opinion is replete with references to Local Rule 56.1, and sets forth and applies the standards of Local Rule 56.1. The District Court's one-time reference to Rule 12(f) was a harmless scrivener's error. *See O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 986 (7th Cir. 2001).

cited. The Seventh Circuit has taken a clear position that the evidence submitted in support of a response to a summary judgment motion need not be admissible at trial. *See, e.g., Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 921 (7th Cir. 1994). However, the evidence set forth must be of a *kind* admissible at trial. *Gustovich v. AT&T Communications, Inc.*, 972 F.2d 845, 849 (7th Cir. 1992). Federal Rule 56(e) likewise requires that affidavits offered in opposition to summary judgment must be made on personal knowledge and set forth facts that would be admissible in evidence.

(c) Dr. Vakharia's Third Response Failed to Conform with Prior Orders of the District Court.

A third reason the District Court struck Dr. Vakharia's third response was her abject failure to comply with the District Court's prior orders. The District Court twice rejected Dr. Vakharia's claims regarding the formation of Evergreen during the course of the proceedings, and dismissed all of her claims on that matter. (R. 123, 230.) Nonetheless, Dr. Vakharia included argument related to Evergreen in both her first and second responses to the Hospital's motion for summary judgment. Each time, the District Court identified the sections of the responses dealing with Evergreen as improper on the grounds that the District Court had already decided the Evergreen issue. (R. 243, 255.) Despite the District Court's prior warnings, Dr. Vakharia intertwined argument concerning Evergreen throughout her third response, providing another reason for the District Court's decision to strike her entire responsive submission. (Pet. at App. 6.) The Court of Appeals rightly cited Dr. Vakharia's "continual disregard for the court's previous orders" as ample justification for this action. (Pet. at App. 4.)

(d) Therefore, the Court of Appeals Correctly Affirmed the District Court's Decision to Strike Dr. Vakharia's Non-Conforming Third Response.

Given the District Court's patient tolerance of Dr. Vakharia's repeated disregard of its orders, the Court of Appeals properly held that neither the District Court nor the Hospital had any obligation to pore over Dr. Vakharia's pleadings to determine which issues were actually disputed matters of fact. (Pet. at App. 5.) *See Greer v. Bd. of Educ.*, 267 F.3d 723, 727 (7th Cir. 2001). It is clear that Dr. Vakharia's third response was not stricken as the result of "one misstep," (Pet. at 8), as Dr. Vakharia suggests. Instead, Dr. Vakharia missed multiple deadlines and requested numerous extensions. (R. 238–41.) Even with the benefit of extra time and the District Court's guidance on how to correct the problems in the second response (R. 278), Dr. Vakharia submitted a third response lacking citations to admissible evidence and containing arguments the District Court had specifically excluded in prior orders. As such, the District Court did not abuse its discretion in striking Dr. Vakharia's entire third response, and the Court of Appeals rightly affirmed that decision.

2. The District Court Properly Granted Summary Judgment Because the Hospital Demonstrated That No Genuine Issue of Material Fact Precluded Summary Judgment.

After determining that the District Court properly struck Dr. Vakharia's third response, the Court of Appeals proceeded to review the District Court's grant of summary judgment *de novo*, "viewing all facts and drawing all reasonable

inferences in the non-moving party's favor." (Pet. at App. 6.) Because the District Court struck Dr. Vakharia's third response, all material facts set forth in the Hospital's Local Rule 56.1 statement of material facts were deemed admitted. *See* Local Rule 56.1(a)(3)(B). Applying the familiar standard that summary judgment is proper when there is no genuine issue as to any material fact,[6] *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986), the Court of Appeals correctly concluded that "[t]here was no evidence upon which the court could have *denied* summary judgment." (Pet. at App. 7 (emphasis added).)

Summary judgment was appropriate in this case because not only did the Hospital meet its burden of demonstrating the absence of a genuine issue of material fact, Dr. Vakharia utterly failed to identify genuine issue of material fact precluding summary judgment. As noted by the District Court, it is not the District Court's responsibility to "scour the record in search of a genuine issue of [material] fact." *Brasic v. Heinemann's, Inc.*, 121 F.3d 281, 285 (7th Cir. 1997). Nor is it the role of the District Court to "research and construct the legal arguments open to parties." *Doherty v. City of Chicago*, 75 F.3d 318, 324 (7th Cir. 1996). The Hospital's submissions clearly illustrated that Dr. Vakharia's largest complaints, delay in processing Dr. Vakharia's application for privileges and breach of the Hospital bylaws, were either the result of Dr. Vakharia's own dilatory tactics (the delay) or nonexistent (breach of the

6. This Court has held that if the non-movant does not present evidence that would reasonably permit the finder of fact to rule in its favor on a genuine issue of material fact, then the court must enter summary judgment against it. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986).

bylaws). (Pet. at App. 20–21.) Simply put, Dr. Vakharia failed to present sufficient evidence to oppose summary judgment.

3. These Facts Do Not Warrant the Exercise of This Court's Supervisory Powers.

The Court of Appeals' order is rooted in the sound application of fundamental legal principles to the unique facts of this case, and is not an appropriate candidate for review under this Court's supervisory authority. In no way has the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" in this case. Sup. Ct. R. 10(a). This is a simple case of faulty pleading and of a record that fails to demonstrate any violation of Dr. Vakharia's right to be free from employment discrimination. As the Court of Appeals so succinctly put it, "Vakharia had eight years to present a claim that passed muster and she failed to do so." (Pet. at App. 5.) Furthermore, because review of the District Court's application of its own local rules will not affect other Circuit Courts of Appeals, these questions are particularly inappropriate for review.

4. The Cases Cited by Dr. Vakharia Are Not in Conflict with the Order Below.

Dr. Vakharia also argues that there is a split of authority among the Courts of Appeals on whether a court may grant summary judgment "because the opposing party violated the local rule." (Pet. at 18.) Each of the cases Dr. Vakharia cites as allegedly conflicting with the order below is plainly not in conflict with the decision of the Court of Appeals. The cases are distinguishable, first and foremost, because

the order of the Court of Appeals below did *not* condone the grant of summary judgment as punishment for a single violation of a local rule. Instead, the Court of Appeals recognized that the District Court struck the response as the punishment for violating the Federal and Local Rules after giving Dr. Vakharia multiple opportunities to submit conforming papers, and only then proceeded to apply standard summary judgment analysis to the record before it. (Pet. at App. 4.)

One of the cases Dr. Vakharia cites, *Stough v. Mayville Community Schools*, 138 F.3d 612 (6th Cir. 1998), exemplifies the error of Dr. Vakharia's argument. In *Stough*, the Court of Appeals reversed because the District Court expressly stated that its grant of summary judgment followed automatically from the non-movant's failure to file a response within the time mandated by the local rule. 138 F.3d at 614–15 (holding that the automatic grant of summary judgment based on the opponent's violation of a local rule improperly relieved the movant of its burden of demonstrating the absence of a genuine issue of material fact); *see also John v. Louisiana Board of Trustees for State Colleges and Universities*, 757 F.2d 698, 708–09 (5th Cir. 1985) (same). *United States v. Lowery*, 166 F.3d 1119 (11th Cir. 1999), on the other hand, merely stands for the proposition that local rules cannot trump federal rules. 166 F.3d at 1125 (holding that the Federal Rules of Evidence are unaffected by state rules of professional conduct).

In sum, the Hospital takes no issue with the general legal principle that "a motion for summary judgment cannot be granted simply because the opposing party violated a local rule," *Marshall v. Gates*, 44 F.3d 722, 725 (9th Cir. 1995). Rather, the Hospital argues that this proposition simply has

no bearing on the facts in the instant case. The District Court held, and the Court of Appeals affirmed, that the Hospital demonstrated that no genuine issue of material fact precluded judgment for Defendants. No disagreement among the Courts of Appeals would be resolved by granting the petition in this matter.

Accordingly, for all these reasons, the writ should be denied as to Dr. Vakharia's Questions One, Three, and Four.

B. The Writ Should Be Denied on Dr. Vakharia's Second Question Presented Because Dr. Vakharia Did Not Raise the Issue Below.

In addition to suffering from one of the same flaws as Questions One, Three, and Four, namely that Question Two conflates the two-step process of striking a pleading for non-conformance with Local Rule 56.1 and granting summary judgment due to the absence of a genuine issue of material fact, Question Two suffers from the additional problem that it was not raised or addressed in the District Court or the Court on Appeals below. Dr. Vakharia's opening brief before the Court of Appeals conceded that the standard of review for the District Court's order striking her response to the Hospital's motion for summary judgment under Local Rule 56.1 is abuse of discretion, and that a grant of summary judgment is reviewed de novo.[7] (Principal Br. of

7. Dr. Vakharia initially argued that the District Court struck her third response under Federal Rule of Civil Procedure 12(f), and that such action was improper. Accordingly, the "Standard of Review" section of Dr. Vakharia's principal brief states that issues related to a district court's authority under Rule 12(f) are reviewed de novo, but admits in the following sentence that if the Court of (Cont'd)

Pl.-Appellant at 2.) Since Dr. Vakharia did not urge the Court of Appeals to review the District Court's Local Rule 56.1 determination under any other standard of review, she waived this argument before this Court.

CONCLUSION

Wherefore, for the foregoing reasons, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(Cont'd)
Appeals held that the third response was stricken under some other rule, *e.g.*, Local Rule 56.1, the standard of review would be abuse of discretion. (Principal Br. of Pl.-Appellant at 2.)